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No. 20143

In The
Supreme Court of the United States

OCTOBER TERM, 1966

LARRY WAYNE HELBERG and DAVID LANDWORTH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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PAGE

INDEX

I. Citations for Opinions Below 1
II. Jurisdiction 1
III. Questions Presented 2
IV. Constitutional Provisions Involved 2
V. Statement of the Case 3
VI. Reasons for Granting the Writ 3
Question A. Prior Convictions of Crime Utilized Against Petitioners 3
Question B. The Allowance of Evidence of Crimes Not Charged to Be Utilized Against Petitioners 6
Question C. The Improper Use of Exculpatory Statements 10
Question D. Improper Argument by U. S. Attorney 11
In Conclusion 14
Appendix A
Constitutional Provisions and Statutes A-1
Appendix B
On Appeal from the United States District Court for the Western District of Washington, Northern Division B-1
Appendix C C-1

TABLE OF CASES

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) 13
Drew v. U.S., 331 F. 2d 85 (1964) 9
Erwing v. U.S., 296 F. 2d 320 (9th Cir. 1961) 8
Johnson v. U.S., 347 F. 2d 803 (1965) 8

TABLE OF CASES

Page

Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 7

Steele v. United States, 222 F.2d 628 (C.A. 5th 1955) 14

TEXT BOOKS

Professor McCormick in His Classic Text On Evidence (1954) pages 93, 94 4

Erwin N. Griswold, Dean of the Harvard Law School, in an Article for the American Bar Association Journal. Volume 51, November, 1965, Page 1021 5

The Uniform Rules of Evidence, R 21 5

Wharton's Criminal Law and Procedure, Vol. II # 2084, (1957) 13

OTHER AUTHORITIES

Title 28, United States Code, Section 1254(1) and Rule 22(2) 2

Title 18 USC, Sec. 2314(3) 3

Fifth and Sixth Amendments to the Constitution of the United States 2

The Sixth Amendment of the United States Constitution 6, 8

Fifth Amendment to the United States Constitution 11, 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT

Larry Wayne Helberg and David Landworth pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on August 23, 1966.

I.

CITATIONS FOR OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra p. B-1, is reported in F.2d.

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 23, 1966. A Petition for Rehearing

was timely filed on September 16, 1966. Rehearing was denied on September 27, 1966. An order granting an extension of time within which the petition of certiorari was applied for by petitioners on October 17, 1966 and granted by this Court October 24, 1966. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1) and Rule 22(2).

III.

QUESTIONS PRESENTED

Whether an accused is denied the right to a fair trial under the Fifth and Sixth Amendments to the Constitution of the United States by:

A. Allowing evidence of prior convictions of crimes to be utilized in evidence against him.

B. Allowing evidence of other crimes not charged to be considered by the jury.

C. Improper impeachment by "exculpatory statements."

D. Improper argument by Government attorney.

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth and Sixth Amendments to the Constitution of the United States, which are printed in Appendix A, infra p. A-1.

V.

STATEMENT OF THE CASE

The petitioners were charged with causing three forged American Express money orders to be transported into interstate commerce (a violation of Title 18 USC, sec. 2314(3)). Two women, Darris Wilson and Darlene Sullivan, testified that they received the money orders from the petitioners to forge and pass. The petitioners testified that this did not happen. The credulity of these four witnesses was extremely important as there were no admissions, confessions or independent eyewitnesses. The trial lasted approximately one court day (Tr. 1, 228).

VI.

REASONS FOR GRANTING THE WRIT

Question A. Prior Convictions of Crime Utilized Against Petitioners.

It is submitted that one of the most fundamental abuses of justice that exists today in criminal law practice and procedure is the practice of allowing the prosecuting authority to cross examine an accused concerning prior convictions of crime. It is submitted that this is an important question of law which has not been, but should be settled by this court. A jury composed of laymen is not sophisticated enough to disassociate the present charge with the past criminal trouble. The common fiction employed that these con-

victions are merely to impeach his credibility as a witness is not only a medieval sociological concept but operates to preclude the accused from having *his* testimoney fairly considered. Assume a defendant with two prior burglary convictions is charged with Burglary. Is he afforded "the presumption of innocence" or "the benefit of a reasonable doubt" when he testifies. He may be innocent this time but would probably be found guilty. Why should the odds be so "stacked" against a man with a prior conviction? If an accused gave testimony of his good character, obviously the jury then should be aware of his negative attributes, to-wit, the convictions. His prior criminal record should also be considered at sentencing time. The accused, however, should be able to testify regarding the current charge without having his testimony compromised.

Professor McCormick in his classic text on Evidence (1954) pages 93, 94, states:

> "The sharpest and most prejudicial impact of the practice of impeachment by conviction is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand. If the accused is forced to admit that he has a 'record of past convictions,' particularly if they are for crimes similar to the one on trial, the danger is obvious that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to its legitimate bearing on credibility."

Professor McCormick writes that one accused of crime should be allowed to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions.

The Uniform Rules of Evidence, R 21 states:

> ". . . if the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless there is first introduced evidence admissible solely for the purpose of supporting his credibility."

This "Uniform Rule of Evidence" is not followed in these United States according to our research.

Erwin N. Griswold, Dean of the Harvard Law School, in an article for the American Bar Association Journal, Volume 51, November, 1965, page 1021, writes that a man with a prior criminal record in this country is far more at the mercy of the authorities — police and judicial — than seems to be warranted.

Dean Griswold states:

> "We say that the evidence of the prior convictions is admissible only to impeach the defendant's testimony, and not as evidence of the prior crimes themselves. Juries are solemnly instructed to this effect. Is there anyone who doubts what the effect of this evidence in fact is on the jury? If we know so clearly what we are actually doing, why do we pretend that we are not doing what we clearly are doing? This problem was discussed

> ably by Dean Wigmore many years ago (1 Wigmore, *Evidence* 194, 1940). Yet very little has been done about it."

Dean Griswold urges that it is time that the courts took action or provide a more just rule than the prevailing practice.

The instant case is an aggravated example of this unfair criminal procedure. The Court allowed the government attorney to cross-examine petitioner Landworth about whether he was *"in jail"* in California (Tr. 171) and the Court asked petitioner Landworth whether he had been convicted of "any crime" in California (Tr. 171). The defense counsel was precluded from asking a key prosecution witness, Darris Wilson, concerning any of her criminal convictions other than felony convictions (Tr. 77). It is submitted that this court review this practice of destroying defendants testimony by evidence of prior convictions and, in particular the usage in this case of the extension of this procedure as this is not due process of law.

Question B. The Allowance of Evidence of Crimes Not Charged To Be Utilized Against Petitioners.

The Sixth Amendment of the United States Constitution requires, in part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusa-

tion." In *Kotteakos v. U.S.*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, one conspiracy was charged and evidence of eight conspiracies was presented. Justice Rutledge speaking for this court stated:

> "The indictment charged a single conspiracy only, the proof showed more than one . . . Numbers are vitally important, in trial, especially in criminal matters."

In the instant case the government attorney over objection of defense counsel was permitted to elicit from a witness that there were "ten or twenty" money orders cashed (Tr. 80). The government attorney expanded this testimony in his final argument to this extent:

> "And why the government did not charge them with forging thirty or forty money orders. It's not necessary. That's not the issue in this case. The only issues are these three we have charged them with — what necessity is there of charging them with *fifty counts* if they deny even three.' (Emphasis supplied) (Tr. 201).

There was no evidence of fifty money orders although the jury probably believed the government could have charged them with that quantity. The government counsel further advised the jury, "Well in a three day period you stop by ten or twenty stores and I think you get an idea of what was taking place" (Tr. 203). This was pure invented evidence as there was evidence of three stores, not ten or twenty stores.

Johnson v. U.S., 347 F. 2d 803 (1965) illustrates that the appellate courts will not countenance government attorneys premising their legal arguments on matters not admitted into evidence.

It is submitted that the Sixth Amendment of the U.S. Constitution, was again violated by the government attorneys questioning of witness John Moore (Tr. 46).

> Q. "Did he (Landworth) tell you actually how they (money orders) had been acquired."
>
> A. "Through a burglary."
>
> The Court: "The jury will consider that only against defendant David Landworth and not Larry Helberg."

Evidence of a separate crime should not have been considered against either defendant. It was not material to proving the crimes charged in the indictment how the money orders were obtained. It did have the effect of indicating to the jury that defendant Landworth *knew* that a crime of burglary had been committed to obtain the money orders. The answer to the question was not responsive, precluding objection by defense counsel and the court made an immediate ruling on the answer. In *Erwing v. U.S.*, 296 F. 2d 320 (9th Cir. 1961), this court stated:

> "The general rule prevailing in this circuit is that when a defendant is on trial for a specific offense, evidence of a distinct offense unconnected

with that charged in the indictment is inadmissible."

What is more prejudicial about this deliberate injection of the word burglary by the government attorney with witness Moore, is how it was magnified and amplified in his final argument to include (1) *both defendants* (2) *committing a burglary.*

The government attorney told the jury in his summation (Tr. 185), "Mr. Landworth stated to Mr. Moore, 'this is the district where *we* acquired the money orders through a burglary.' " (The government attorney quoted the testimony in his argument to make it appear as testified to *verbatim.*)

The only inference that the jury could make from counsel's argument was the improper one that the defendants had committed a burglary to obtain the money orders. Since the likelihood that juries will make an improper inference is high, courts *presume prejudice* and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. *Drew v. U.S.,* 331 F. 2d 85 (1964).

We submit that evidence interjected of ten, twenty, or fifty money orders when three are charged is highly prejudicial, and impossible to defend against. The ploy of burglary, and the connection of petitioners with burglary, (not a federal crime and not charged,) were "blows beneath the belt" which also were impossible

to defend against. These tactics prevented the petitioners from being "informed of the nature and cause of the accusation", so they could meet the charge.

Question C. The Improper Use of Exculpatory Statements.

The government attorney presented an FBI agent named Billy Hicks, in his case "in chief" admittedly not to testify as to anything probative or material or incriminating (Tr. 129) but to relate "some exculpatory statements which I feel the jury should be aware of," "which show his (defendant's) state of mind and indicate that he is guilty of the crime charged" (Tr. 130).

The defense attorney objected that this was in no way material to the charge and its effect would be to further prejudice the defendants (Tr. 129).

The trial judge stated he felt it should properly be rebuttal, or maybe cross-examination of defendants (Tr. 129) and sustained the objection and told the government attorney he would not allow him to introduce statements unconnected with the essential elements of the crime at that stage of the trial (Tr. 130).

The court reversed its earlier ruling to a limited extent, after further argument by the government attorney (Tr. 131, 133). The government attorney, taking advantage of the court's limited ruling, pro-

ceeded to introduce matters the court ruled he couldn't. The court admonished the government counsel, although the damaging testimony was heard by the jury! (Tr. 137, 143, 144).

The statements of defendants offered by the prosecution were not admissions or confessions — what probative value did they have. It was negative evidence, not positive evidence. They didn't prove or tend to prove any element of the crimes charged. It was obviously a form of impeachment. Impeachment of *any kind* and especially on a collateral matter should not have been allowed in the government's direct testimony on its case in chief.

We fail to see how exculpatory statements can properly be utilized at the stage of trial they were presented and we feel this court should review the usage of these statements to preclude other accused of facing this unfair practice. The usage of these statments, it is submitted, deprives the petitioners of their rights secured by the Fifth Amendment to the United States Constitution, the right to not be deprived of their liberty without due process of law.

Question D. Improper Argument by U. S. Attorney

One of the most flagrant of many unfair tactics employed by the government attorney in this one day trial (Tr. 191) was in his final argument where he

stated his personal opinion regarding the relative truthfulness of the government witnesses vs. the defendants, and his personal opinion of the defendants' guilt. For example:

> Tr. 186 — "*I* can assure you that the testimony as indicated by the two defendants is not the truth. It simply is not the truth."
>
> Tr. 189 — "*I* have never seen a case where the evidence is so overwhelming."
>
> Tr. 190 — "But *I* can submit to you that without a doubt in my mind these people were telling the truth, the four government witnesses were telling the truth."
>
> Tr. 202 — "But *I* submit to you that they (the women) were telling the truth on the stand, and if anyone has told untruths in this court room it has been these two men. They told untruths to Mr. Billy Hicks of the FBI and they told untruths on this witness stand."
>
> Tr. 203 — "There is no question about the guilt of these two men."
>
> Tr. 205 — "The evidence in this case ladies and gentlemen is overwhelming. In the short time that I have been trying cases I have not seen a case where the evidence was as overwhelming as in this case."
>
> Tr. 205 — "These defendants are the two interested people. These are the ones that have reason not to tell the truth, these two gentlemen here who told untruth after untruth to the FBI. These are the people who did not tell the truth to the court."

It is improper for the government prosecuting attorney in argument to state his personal beliefs as to the evidence, as the following authorities relate:

> "It adds to the probative force of the testimony adduced upon the trial the weight of the prosecutor's personal influence, knowledge, professional opinion and official opinion" (Wharton's Criminal Law and Procedure, Vol. II #2084, 1957).

> "The argument of the district attorney, particularly his closing argument, comes from an official representative of the people. As such, it does and it should carry great weight. It must therefore, be reasonably objective . . . The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige . . . Prosecuting officials have no right to weaken the presumption of innocence and the right not to be found guilty except upon a finding of a jury that the offense has been proven beyond a reasonable doubt" (People v. Talle, 111 Cal App. 2d 650, 245 p. 2d 633 (1952)).

In *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), this Court stated:

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . But while he may strike hard blows, his is not at liberty to strike foul ones."

In *Steele v. United States*, 222 F.2d 628 (C.A. 5th 1955), the court states that statements by the U. S. Attorney in his argument to the jury, including the assertion of his personal opinion that the defendant was guilty, although not objected to, were held to be,

> "so far out of bounds as to put the district judge in error in not, of his own motion, admonishing the Government Counsel to desist from that kind of argument and directing the jury that the argument was incorrect and unfair, and that they should not consider it."

We submit the petitioners were deprived of their liberty by violation of the Fifth Amendment of the United States Constitution.

IN CONCLUSION

We feel that a writ of ceriorari should be granted for the foreoing reasons to decide these important criminal procedure questions.

Respectfully submitted,

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November 7, 1966

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the Constiution of the United States:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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APPENDIX B

On Appeal from the United States District Court for the Western District of Washington, Northern Division.

Before: JERTBERG and ELY, Circuit Judges, and FOLEY, JR., District Judge.

PER CURIAM:

Following trial to a jury, appellants were convicted on each count of a three count indictment, each count charging that appellants, with fraudulent intent, caused to be transported in interstate commerce from Seattle, Washington, to New York, New York, a forged security, to wit: an American Express Money Order, knowing said money order to be falsely made and forged, all in violation of 18 U.S.C. § §.2314 and 2.

The money order described in Count I, is dated August 27, 1963, and is in the amount of $100.00. The money order in Count II is dated August 30, 1963, and is in the amount of $100.00. The money order in Count III is dated August 30, 1963 and is in the amount of $10.00.

Appellants make no attack on the sufficiency of the evidence to establish their guilt. An examination of the transcript of testimony discloses that the verdict of guilty returned against each defendant, on each count of the indictment, is abundantly supported. Appellants, testifying in their own behalf, denied any

knowledge of, or participation in, the commission of any of the offenses charged. The members of the jury chose to reject the testimony of the defendants [appellants] and to place their credence in the testimony of the several witnesses for the government. The record reveals that on August 29, 1963, a burglary occurred at a Seattle pharmacy, and a number of American Express Money Orders were taken, the exact number taken does not appear in the record.

A day or two after the burglary, appellants attempted to cash American Express Money Orders at a club in Seattle, but were unsuccessful. Appellants then secured the services of two young ladies to cash the money orders for them. The young ladies testified that they cashed the three money orders set forth in the indictment at the request and direction of the appellants, and turned over to the appellants the cash which they received. Appellants testified that they were acquainted with these young ladies and lived with them at different motels during the period that the money orders were cashed, but denied any knowledge of the activities of these young ladies in connection with the cashing of the money orders.

Appellants contend that they were denied a fair trial because:

1. Evidence of the burglary, a separate and distinct crime not charged in the indictment, was received;

2. Evidence concerning American Express Money Orders, not mentioned in the indictment, was received;

3. Evidence in the immoral conduct of appellants in living with the two young ladies was received;

4. Impeachment evidence against the appellants was improperly received; and

5. Improper remarks were made by the prosecutor in his closing argument to the jury.

We have carefully reviewed the record in the light of each of appellants' contentions. No objection was made by appellants as to any evidence introduced concerning the burglary. No objections were made calling to the District Court's attention the claimed improper remarks made to the jury. Appellants having taken the stand were properly impeached by evidence of prior felony convictions and by prior inconsistent statements. Appellants were not prejudiced by evidence of immoral conduct with the two young ladies. The prosecuting attorney advised the jury, in his opening statement at the very beginning of the trial, of the Government's intent to offer the evidence. The defense made no objection at the time, and the explanation is clearly seen from an examination of the record as a whole. The defense itself urged, as it obviously intended to do when it interposed no objection to the prosecution's opening statement, that the appellants sought the company of the young ladies

for lustful purposes and not for their assistance in accomplishing the crimes which were charged. Under these circumstances, there was a waiver of any objection which might, in a different setting, have been properly presented. Reference to other money orders was casual and consisted mainly of the testimony of one of the young ladies who testified that the defendants had quite a few of them, and she testified that she cashed about ten or twenty of them. This testimony came in without objection on the part of the appellants.

We are satisfied from our review of the entire record that the appellants received a fair and impartial trial and that errors, if any, appearing in the record are harmless.

The judgment of conviction appealed from is affirmed.

APPEDIX C

Dear Sir:

In case No. 20143 Helberg & Landworth v. USA an opinion was this day filed, in accordance with which a Judgment or Decree was filed and entered affirming, etc. judgment of Decree of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition, Civil cases: 90 days Criminal cases: 30 days.

Sincerely,

WM. B. LUCK
Clerk